UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

ACCESS PRIVATE DUTY NURSING SERVICES, INC.

Employer

- and - **Case No. 2-RC-22691**

PRIVATE REGISTERED NURSES ASSOCIATION AT MOUNT SINAI

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

A Decision and Order Dismissing in Part and Reopening Record issued in this matter on April 10, 2003. I found that Mount Sinai Hospital and Access Private Duty Services, Inc., the Employer herein, were not joint employers of the private duty nurses presently employed by Employer who perform their services at Mount Sinai. As such, I dismissed the petition as it pertained to Mount Sinai. Further, in order to decide the remaining issues, I ordered that the record be reopened for additional evidence relating to the hours and/or shifts worked by each private duty nurse on a weekly basis from January 13, 2003, to the end of the workweek immediately preceding the reopening of the record.

On May 8, 2003, the parties submitted Joint Exhibit 1, which is an affidavit of Thomas Weadock, Vice President, with exhibits summarizing the hours each private duty nurse has worked for the Employer from the inception of the

Employer's operations in January 2003 through to April 28, 2003. Both the Employer and Petitioner thereafter filed supplemental briefs.

The issues remaining for decision herein are (1) whether the petition was filed prematurely; and (2) assuming the petition was timely filed, what formula should be used to determine eligibility for voting in the election.

The Employer contends that the petition should be dismissed as untimely because it only commenced its operations in mid-January 13, 2003, and does not yet employ a representative complement of employees. Petitioner, on the contrary, argues that the petition is timely and that an immediate election should be conducted so as not to deprive these employees of their Section 7 rights to bargain collectively. As to the appropriate eligibility formula, Petitioner asserts that the formula set forth in *May Department Store*, 181 NLRB 710, 711 (1970), which slightly modified the Board's customary *Davison Paxon* formula, would be appropriate. In that case, the Board held that employees who worked at least one shift in three of 13 weeks would be eligible to vote. Alternatively, Petitioner contends the formula applied *Marquette General Hospital*, 218 NLRB 713 (1975) would be appropriate. The Employer contends that if the Board decides to direct an election, it should apply the broadest possible formula. In this regard, the Employer asserts the Board should find that any person on its roster of private duty nurses should be eligible to vote, even if he or she has not yet worked a shift. Alternatively, the Employer contends that all those private duty nurses who have worked at least one shift for the Employer at Mount Sinai should be eligible to vote.

FACTS

Access' overall structure and operations

For many years, the Employer has provided private duty nurses to clients who are patients at several hospitals located in New York City. It employs between 350 and 400 nurses, who provide private duty nursing services at Lenox Hill Hospital, the Hospital for Joint Disease and Orthopedic Institute, New York University Medical Center and most recently Mount Sinai Hospital.

Private duty nursing is a discretionary service that is rendered to patients who have been hospitalized. It is a service sought by patients and/or their families in situations where the patient needs one-on-one nursing care that the hospital is not equipped to provide. The patient pays for this service himself or herself.

The Employer entered into a contractual relationship with Mount Sinai Hospital to be the sole provider of private duty nurses. Registered nurses are recruited and screened by the Employer, who matches patients desiring private duty nursing with one of the nurses it employs. Some of its nurses work only at a specific hospital while others may take clients at several hospital facilities. Many of those who work as private duty nurses are also employed as full-time staff nurses at one of the New York City hospitals. The Employer collects a fee for the nursing services from the patient and pays the private duty nurse for their shifts on a weekly basis. Nurses who work a required number of hours (which were not specified on the record) for the Employer are eligible for certain benefits,

including participation in a Section 401(k) plan, vacation time, and health benefits.

Mount Sinai Hospital and Private Duty Nurses

Prior to January 13, 2003, Mount maintained a registry of approximately 214 nurses from which nurses were solicited to work for a patient in the capacity of a private duty nurse, although the record is silent with respect to the frequency and amount of work these private duty nurses performed. The Employer commenced operations in mid-January 2003 with a roster of approximately 107 private duty nurses. The number of nurses eligible to work at Mount Sinai who are on the roster as of the week ending April 18 has increased to 127.

Staffing by Access at Mount Sinai

Louise Weadock , the Employer's President, testified that the Employer chooses the nurses who work for it at Mount Sinai from a roster described above. She further testified that the need for private duty nursing service is difficult to predict. Ms. Weadock specifically asserted that you could not look at a hospital's past utilization of private duty nurses to determine the future need due to the great fluctuation in the need for these services. The use of this service depends upon the condition of the economy and changes in managed care and insurance coverage. Ms. Weadock cited as an example of this the fact that two weeks prior to her testimony, she had 67 cases at Mount Sinai, while at the time of her testimony she had only 12 cases. Nonetheless, Weadock offered an optimistic prediction that once her company became entrenched at Mount Sinai the numbers would climb. She said that increase in demand would occur

because the Employer offers a “focused program”. Evidence in support of such an increase at the inception of service by the Employer at the other hospitals was not offered at the hearing.

Vice President of Operations Tom Weadock testified at the hearing that he had reviewed the roster of nurses who were eligible under the arrangement in effect before January 13, 2003, and stated there were 214 such nurses. Of those, only 107 applied for employment with the Employer and qualified for employment under its hiring criteria. From this group, 56 private duty nurses actually worked for the Employer on a 12-hour shift as of March 12, 2003, the day he testified. Mr. Weadock was unable to predict the current staffing needs of the Employer at Mount Sinai because there had been strong fluctuation over the preceding 6 to 7 weeks. Mr. Weadock further testified that after reviewing the records he had available to him at that time that 32 nurses had worked at least 52 hours from January 13, 2003 through March 12, 2003, the day of his testimony.

Mr. Weadock provided further testimony by means of his post-hearing affidavit dated May 6. After reviewing the Employer’s payroll records, Mr. Weadock prepared a summary of the hours worked by the Employer’s private duty nurses at Mount Sinai for the period from January 13, 2003 through the week ending April 18, 2003. This period represented a total of 14 weekly payroll periods starting with the commencement of the Employer’s operations at Mount Sinai. He indicated that in the five-week period from the close of the hearing, the Employer’s roster had grown to 127 private duty nurses who were eligible for

employment at that location. Mr. Weadock states that from his analysis of the records, 45 nurses from the roster had worked at least 52 hours and 28 had worked 120 or more hours. 28 of the nurses have worked one or more shifts for three or less weeks. 22 nurses have worked at least one shift on 4 to 6 weeks. 10 nurses have worked at least one shift for 7 or more weeks. Finally, 7 nurses have worked at least one shift on 11 of 13 weeks. No nurse worked at least once each of the weeks that the Employer has conducted its business at Mount Sinai Hospital. The record as supplemented further discloses that the Employer has employed 62 of the nurses from its roster for at least one full shift. The shifts nurses have worked for the Employer has ranged from one shift, worked by two nurses, to 54 shifts worked by one nurse. 31 nurses have worked 9 or more shifts while the remaining nurses have worked 7 or fewer shifts. These 62 nurses have worked a total of 864 shifts for an arithmetic mean of 13.9 shifts per nurse.

The records submitted by the parties in their post-hearing exhibit shows that for the period from January 13, 2003 to the week ending April 18, 2003 the following:

SHIFTS WORKED	**NUMBER OF NURSES**
1	2
2	7
3	5
4	5
5	2
6	6

7	4
8	0
9	2
10	2
11	1
12	2
13	0
14	2
15	2
16	3
17	1

In addition to the above, 16 nurses have worked between 21 shifts and 54 shifts.

ANALYSIS

Premature Petition

The Employer argues that it does not have a substantial and representative complement of employees and thus an election should not be conducted at this time. Citing the Seventh Circuit Court of Appeals decision in *NLRB v. Deutsche Post Global Mail Ltd*., 315 F. 3d 813, 816 (7th Cir. 2003), the Employer contends that in cases involving an expanding unit the Board should apply the following factors: (1) the size of the employee unit at the time of the hearing; (2) the projected size of the post-expansion unit; (3) the extent to which

the projected additional jobs represent separate and distinct skills and functions; and (4) the time expected to elapse before the planned reorganization or expansion. The Employer contends that the application of these factors warrants a conclusion that there is no representative complement of private duty nurses at this time. It therefore contends that a representation petition is untimely at this point. Petitioner argues that the factors set forth in *Toto Industries (Atlanta), Inc*., 323 NLRB 645 (1997) require a conclusion that the petition should be processed and an election be conducted. In addition to the factors set forth by the Employer, Petitioner contends that the Board also considers the size of the employee complement who are eligible to vote, the rate of expansion, including the timing and size of the projected expansion, the certainty of the expansion, the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached and the nature of the industry.

In *Endicott Johnson de Puerto Rico*, 172 NLRB 1676 (1968), the Board held that the principles established in *General Extrusion Co*., 121 NLRB 1165 (1958) were not applicable in the determination of whether an election should be held in a situation where a unit is expanding in an unorganized plant. However, in *Custom Deliveries*, 315 NLRB 1018,1019 fn. 8 (1994), the Board noted that it takes guidance from the *General Extrusion* principles and will find an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. See also *Gerlach Meat Co*., 192 NLRB 559 (1971). Moreover, the Board has held that it will direct an immediate

election, notwithstanding an employer's plan to expand its workforce, when the employer's current complement of employees is "substantial and representative" of the unit workforce to be employed in the near future. See *Yellowstone International Mailing, Inc*., 332 NLRB No. 35 (2000), and *Toto Industries (Atlanta)*, 323 NLRB 645 (1997). In *Toto Industries*, the Board noted that the planned expansion to a 24-hour operation would almost double the total workforce, but would not add any classifications with separate or distinct job skills. The Board held that although the staff would increase significantly, an immediate election was nonetheless appropriate because there were slightly over 50% of the anticipated employee complement present and thus there would be no unreasonable disenfranchisement of employees by conducting an immediate election.

As noted by the Employer's president, the Employer's staffing needs are uncertain and vary substantially due to factors beyond the Employer's control. Therefore, it can never be known with any certainty how large the roster of eligible nurses will ultimately become or how frequently each nurse on the ultimate roster will work. This case therefore doesn't present a situation where there is a planned and definitive expansion. Thus, it is impossible for me, based on this record, to determine what the ultimate size of the Employer's complement of employees at its Mount Sinai location will be. While the Employer here as in *Toto Industries* employs 100% of the job classifications, it cannot be determined what percentage of the ultimate complement of employees are presently employed by the Employer. In both *NLRB v. Deutsche Post Global Mail Ltd*.,

cited by the Employer, and *Toto Industries* cited by the Petitioner, it appears that the present size of the unit as compared to the size of the unit after the projected expansion is a factor that will be considered by the Board in determining whether to conduct an election. Expansion of the work force here is not part of a definitive plan, but is just an understandable and fervent hope of the Employer. Any possible expansion of the unit is dependent upon circumstances beyond the Employer's control. Therefore, I find that the record here is insufficient to establish that at present the Employer does not employ a substantial and representative complement of employees.

Eligibility formula

Also at issue here is the eligibility formula that should be applied in order to determine which employees in this unit that is comprised exclusively of "on call" employees are eligible to vote. Petitioner urges that the Board's most commonly used criteria set forth in *Davison-Paxon Co*., 185 NLRB 21 (1970), as modified slightly in *May Department Stores*, 181 NLRB 710 (1970), should be applied here. The Employer contends that the Board should apply the broadest possible formula and should find that any person on the Employer's roster of private duty nurses is eligible to vote, even if he or she has not yet worked a shift. Alternatively, the Employer contends that all those private duty nurses who have worked at least one shift for the Employer at Mount Sinai should be eligible to vote.

As noted above, the record establishes that this industry is susceptible to wide shifts in the number of patient's utilizing the Employer's service. Private duty

nursing was described as a “discretionary” service and as such is subject to fluctuation. From the testimony of both Ms. Weadock and Mr. Weadock, it is clear that this is a business in which there are no full-time employees performing services for the Employer and that the staffing needs fluctuate depending upon numerous factors beyond the control of the Employer. Specifically, it appears that the number of cases dropped from 67 to 12 in the two weeks immediately preceding the hearing. Ms. Weadock testified that because of the nature of the industry, she simply could not predict with any accuracy the number of employees she will require at Mount Sinai.

While *Davison-Paxon* is the most widely used test used by the Board to determine eligibility of employees who do not work a full-time schedule, special circumstances, such as a wide disparity in the number of hours worked by on call nurses, could require the use of a different formula. See *Marquette General Hospital*, 218 NLRB 713 (1975).

The Employer has a roster of 127 registered nurses who are fully qualified to work as private duty nurses at Mount Sinai. The record as supplemented further discloses that since it commenced its operations at Mount Sinai, the Employer has employed 62 of the nurses from its roster for at least one full shift. The range in the number of shifts worked by the employees in the petitioned-for unit is from a low of 1 shift to a high of 54 shifts during the 14-week period. However, only 16 of the nurses have worked more than 20 shifts since January 2003, while 46 nurses have worked 17 or fewer shifts. 31 nurses have worked 7 or fewer shifts and 9 nurses have worked only one or two shifts. Thus, while

there is a relatively wide discrepancy between the most frequent worker and the least frequent worker, 32 nurses, a majority of those nurses who have worked for the Employer, have worked between 4 and 17 shifts. The remaining 30 nurses have either worked less than 4 shifts or more than 17 shifts.

The Employer's proposed formula, which would include everyone on the Employer's roster, even if they have never worked for the Employer at Mount Sinai, is far too broad. It would include nurses who may never work for the Employer. Additionally, the Employer's alternate formula, which would include everyone who worked one shift, is also too broad. This alternative formula would include Mylah-Sol DeLeon and Beris Harper, each of who worked one shift during the week of January 17, 2003, but have not worked thereafter. Thus, a formula that would reflect the reality of the Employer's employment situation must be utilized. Despite the disparity in the range of work performed by the nurses employed by the Employer, it appears that the Board's formula set forth in *Davison Paxon* is most appropriate formula. The *Davison Paxon* formula will distinguish between those employees who work with sufficient regularity and those who work so sporadically as to require their exclusion. The Board in *Sisters of Mercy Health Corporation*, 298 NLRB 483 (1990), held that the *Marquette* standard for eligibility was inappropriate where there was no real disparity in the amount of work performed by those doing unit work and that in these circumstances, the *Davison-Paxon* formula was more appropriate. Here, despite the wide difference in the range from most frequent to least frequent, the largest number of shifts falls within a rather defined number. Thus, I find that the *Davison*

Paxon formula is the appropriate eligibility formula and any employee who has worked a sufficient number of shifts of any duration that total 52 hours in the 13-week (an average of 4 hours a week for 13 weeks) prior to the eligibility date will be eligible to vote.

Accordingly, I therefore find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

> Included: All private duty nurses employed by the Employer at its Mount Sinai Hospital location;
> Excluded: All other employees, and guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted[1] by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[2] Eligible to vote are those in the unit who worked an average of 4 hours per week for the 13-week period prior to the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced

[1] Pursuant to Section 101.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

[2] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall

[3] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **June 25, 2003**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

vote on whether or not they desire to be represented for collective bargaining purposes by Private Registered Nurses Association.[4]

Date at New York, New York
This 18th day of June 2003

(s) Celeste J. Mattina
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Code: 316-6701-8300
362-6712

[4] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **July 2, 2003.**